

**STATE PERSONNEL BOARD, STATE OF COLORADO**  
Case No. **2002B055**

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**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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**MARK A. ORR,**

Complainant,

vs.

**DEPARTMENT OF PUBLIC SAFETY, COLORADO STATE PATROL,**

Respondent.

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Administrative Law Judge Mary S. McClatchey held the hearing in this matter on April 9, 2002. Assistant Attorney General John Lizza represented Respondent. Complainant appeared and represented himself.

**MATTER APPEALED**

Mark A. Orr ("Complainant" or "Orr") appeals his termination from employment by Respondent, Department of Public Safety, Colorado State Patrol ("CSP").

For the reasons set forth below, Respondent's action is **affirmed**.

**ISSUES**

1. Whether Complainant committed the acts for which he was disciplined;
2. Whether Respondent's action was arbitrary, capricious or contrary to rule or law.

**FINDINGS OF FACT**

1. Complainant has been a classified employee since 1985. In 1999, he became Manager of Procurement at CSP, with the title of General Professional IV.
2. Complainant's 1999/2000 and 2000/2001 overall performance ratings were Commendable.
3. CSP General Orders include the following:

- members will obey the law;
- members will conduct themselves in a manner that will preserve the public trust and utilize their authority appropriately;
- members will avoid any conduct which would bring discredit or undermine the credibility of themselves, the Colorado State Patrol, or the police profession;
- members will conduct themselves to reflect the highest degree of professionalism and integrity and to ensure that all people are treated with fairness, courtesy and respect.

#### October 13, 2001 Failure to Report to Work

4. Complainant's appointing authority, Lieutenant Colonel Mark Trostel, organized an international tour of the CSP Law Enforcement Training Academy on Saturday, October 13, 2001. Complainant offered to work on October 13 in order to be one of the four tour directors.
5. On October 13, 2001, Lt. Col. Trostel arrived with forty tour participants. Complainant failed to appear for duty. He did not call anyone at CSP to report his unexcused absence.
6. Complainant called his immediate supervisor and Trostel on Monday, October 15, 2001, to apologize for having missed his Saturday shift, explaining that he had been in a hotel with his wife all weekend attempting to reconcile.
7. Trostel learned that the Lakewood Police Department had been called to Complainant's home over the weekend.
8. Trostel was aware that Complainant had had prior contacts with the Lakewood Police Department. The first was a July 4, 1999 domestic violence call on Complainant. When the police arrived, Complainant was visibly intoxicated from alcohol and marijuana consumption, and very upset. The police confiscated marijuana from Complainant, resulting in a possession conviction. After this incident, Trostel had met with Complainant to discuss it in detail. He ordered Complainant to inform him in the future if the police were called to his residence and if he were going to be charged with a crime. In a second incident, on January 20, 2001, Complainant's five-year old son called 911 to report that Complainant had hit his 18-year-old sister. When the police arrived, Complainant was very intoxicated, and was taken to detox. Complainant was convicted of third degree assault on his daughter and placed on probation through July 2002. Complainant called Trostel from the police station to report this incident.

9. Following the January 2000 incident, Trostel met with Complainant and said he felt his alcohol consumption had become a problem. Trostel suggested that Complainant get counseling. Complainant denied any problem with alcohol or being an alcoholic, and never sought counseling.
10. When Complainant failed to appear for work on October 13 and Trostel learned that the police had been called to Complainant's home, Trostel ordered CSP Internal Affairs ("IA") to conduct an investigation into what had occurred that weekend, as well as into Complainant's prior contacts with the Lakewood police.

#### October 31, 2001 Meeting with Internal Affairs

11. Complainant's meeting with the IA investigator was scheduled for October 31, 2001 at 10:00 a.m. Complainant appeared for the meeting smelling of alcohol. His eyes were bloodshot and glassy. When the IA officer asked him if he had been drinking that day, he denied it, but state he had had "a beer or two" the previous night. This statement turned out to be a gross understatement of the amount of alcohol he had consumed.
12. During this meeting, Complainant admitted that alcohol had been a factor in prior contacts with the police, including his January 20, 2001 conviction for third degree assault on his 18-year old daughter; and his 1999 conviction for marijuana possession.
13. When the IA officer asked Complainant what the terms of his probation were, he stated that he had to attend alcohol education classes and check in with his probation officer monthly. He neglected to mention the fact that one term of probation was to refrain from any alcohol use. When the IA officer asked Complainant if his probation officer was aware that he was continuing to drink, he stated that he was not.
14. When the IA officer asked Complainant if he was working on his alcohol problem, he stated that he was attending the alcohol education classes required as a term of probation.
15. Immediately following the meeting with the IA officer, Complainant took a roadside sobriety test and failed. He then was asked to submit to a blood test, to which he agreed. When this test was administered at 12:25 p.m., Complainant stated that he had had four or five beers the previous night.
16. Complainant's blood alcohol level, taken at 12:25 p.m., was 0.057, which is within the legally defined range of 0.05 to 0.10, "under the influence," under Colorado Revised Statutes Section 42-4-1301 *et seq.*
17. An average person weighing 185 pounds dissipates alcohol at a rate of 0.015 per

hour. Complainant weighs approximately 195 pounds. Using this formula, Complainant's blood alcohol level at 7 a.m., the time he drove to and arrived at work on October 31, 2001, was at or about 0.132, which is within the legal definition of the more serious violation of driving under the influence of alcohol. C.R.S. Section 42-4-1301 *et seq.*

18. Complainant drove to work on the morning of October 31, 2001 under the influence of alcohol, in violation of the law.
19. The IA officer drafted a report and submitted it to Trostel.
20. Trostel sent a notice of pre-disciplinary R-6-10 meeting to Complainant on November 2, 2001. In his letter, he advised Complainant that it appeared he had violated CSP General Orders by failing to report for duty on October 13, failing to notify his supervisor of his inability to report to work on that date, failing to advise him of a police contact that weekend, and reporting for duty on October 31 displaying obvious signs of intoxication.

#### The R-6-10 Meeting

21. Complainant attended the R-6-10 meeting with Trostel on November 16, 2001. He elected to have no representative present. At that meeting, Complainant admitted not contacting anyone at CSP on October 13, 2001 regarding his absence from work. He explained that he was at a hotel with his wife "reconciling differences" and had "completely forgot[ten]" about having agreed to work that day. He further stated that he did not have any of the phone numbers for the office with him, and that his cell phone was broken. Complainant stated that he remembered he was supposed to have been at work in the late afternoon or around 6:00 p.m. on Saturday, October 13, 2001, but that he did not contact his direct supervisor, Bob Dirnberger, or Trostel, until Monday, October 15.
22. Trostel asked Complainant what he had been drinking the night before the October 31 meeting with IA at which he arrived intoxicated. He stated that his wife had informed him that after he "really started to get serious about painting" he drank more than four or five beers, and that he "just wasn't paying attention to what I was drinking." He further stated that his wife informed him "I may have gotten into my son-in-law, my future son-in-law's vodka, but I don't recall that at all." "But I have no recollection of that too. But based on what she said. . . , that's what took place, then the next day I came in with an extreme hangover."
23. Trostel asked Complainant, "Do you realize that you were under the influence at 7:00 a.m. if your blood alcohol at 12:30 p.m. was impaired?" Complainant responded, "I, I do realize that and had it not been for the e-mail from Bob Dirnberger regarding . . . [the IA] interview I would have called off that day, cause I wouldn't have come to work that way, other than the fact that I knew that I had that

interview that I had to come to. . . the way I was I knew I shouldn't be driving or I shouldn't be coming to work."

24. Trostel asked Complainant if, when driving to work that day, he perceived himself to be under the influence of alcohol. Complainant answered, "Yes, I did, yes, I did and that's one of the reasons why I would have called in, realizing that I did something foolish not knowing what I did cause I hadn't talked to my wife yet." Trostel then asked, "Is this typical or is it unusual that you don't know how much you drank?" Complainant answered, "Umm, it's normal and unusual but there are occasions when it does happen and this one was, like I say I was painting and part of it was the nervousness of knowing I had the meeting the next day . . . ." He explained that he had wanted to "just calm down a little bit, well I calmed down way too much. . . ."
25. Trostel asked Complainant why he had not called him, as Trostel had directed him to do in the event of a police contact at his residence and if he were to be charged with a crime. Complainant explained that he was not home when the police arrived, had not been charged with a crime, and had been unaware the police had been called until after he and his wife arrived at the hotel. [The police were called due a loud argument between Complainant and his wife.] The police had come to the hotel, interviewed him and his wife, and then cleared them. Trostel determined that Complainant had not violated his order.
26. At the close of the R-6-10 meeting, Trostel asked Complainant if he had any additional information he sought to provide. He had none.
27. Notably, Complainant said nothing to Trostel about any commitment to stop drinking or to participate in Alcoholics Anonymous. He reported participating in the court ordered alcohol assessment and follow-up alcohol and drug awareness education program in order to meet the terms of his probation. This did not constitute counseling.
28. Trostel was expecting more of Complainant at the R-6-10 meeting. He was extremely concerned that Complainant failed to recognize that his drinking was adversely affecting his job, and that he had not decided it was time to stop drinking. He felt that Complainant viewed the situation nonchalantly and did not understand the seriousness of his violations of the law and of the agency's General Orders.
29. Trostel read the transcript of the October 31, 2001 meeting with IA, and reviewed the blood alcohol test results prior to making his decision.
30. Trostel also reviewed the documents relating to Complainant's prior contacts with the Lakewood Police Department. These documents evinced a longstanding pattern of alcohol abuse. Trostel felt that Complainant's alcohol abuse, while a personal issue that would normally be considered separate from work, had now seriously interfered with his work life.

31. The primary mission of CSP, a law enforcement agency, is to prohibit members of the public from driving impaired and to enforce the drunk driving laws. Complainant had broken this law himself. Trostel concluded that Complainant's October conduct, and his previous convictions of marijuana possession and third degree assault, violated the public trust in CSP: in order to enforce the law, one had to be in compliance with the law.
32. Trostel concluded that Complainant's conduct violated numerous CSP General Orders, including, "Members will obey the law;" "Members will conduct themselves in a manner that will preserve the public trust and utilize their authority appropriately;" "Members will avoid any conduct which would bring discredit or undermine the credibility of themselves, the Colorado State Patrol, or the police profession;" and "Members will conduct themselves to reflect the highest degree of professionalism and integrity and to ensure that all people are treated with fairness, courtesy, and respect."
33. Trostel had never dealt with this type of situation before. He consulted with his supervisor, the chief of the CSP, and his fellow Lieutenant Colonels, regarding what action to take.
34. Trostel had shown great leniency toward Complainant in verbally counseling him in 1999 and 2000. Despite Trostel's suggestion that Complainant get counseling for his alcohol problem in early 2000, Complainant had not done so. Faced now with yet another extremely serious situation involving alcohol and lack of sound decision making, Trostel determined that the agency faced tremendous liability if it continued to employ Complainant.
35. Trostel terminated Complainant on November 16, 2001 for violating CSP General Orders 1, 2, 4, 6, and 7 and Colorado State Personnel Board Rule R-6-9.

## **DISCUSSION**

### **I. Standard of Proof**

Certified state employees have a property interest in their positions and may only be terminated for just cause. Colo. Const. art. 12, §§ 13-15; §§ 24-50-101, *et seq.*, C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rules R-6-9, 4 CCR 801 and generally includes:

- (1) failure to comply with standards of efficient service or competence;
- (2) willful misconduct or violation of the State Personnel Board rules or the rules of the agency of employment;

- (3) willful failure to perform or inability to perform duties assigned; and
- (4) final conviction of a felony or any other offense involving moral turpitude.

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Kinchen, supra*. The Board may reverse Respondent's decision only if the action is found arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

## **II. Complainant committed the acts for which he was disciplined**

Respondent terminated Complainant for failing to report for duty, failing to notify a supervisor regarding his absence from work, and reporting to work while under the influence of alcohol, in violation of CSP General Orders and Board Rule R-6-9. Complainant does not deny having committed the acts for which he was disciplined. Moreover, he does not argue that his actions did not constitute a violation of the CSP General Orders or Board Rule R-6-9. (In fact, Complainant's only participation at hearing was to cross-examine Respondent's witnesses; Complainant did not testify on his own behalf or call any witnesses.)

Complainant's actions did constitute a violation of CSP General Orders and Board Rule R-6-9. Complainant drove to work in an intoxicated state that met the state law definition of driving under the influence of alcohol. Section 42-4-1301, C.R.S. *et seq.* This conduct, and appearing for work intoxicated, brought discredit on and undermined the credibility of the state agency whose primary charge is to enforce the drunk driving laws. This conduct failed to reflect the highest degree of professionalism and integrity. Failing to report for duty or to call in to report the absence constituted failure to comply with standards of efficient service or competence under R-6-10.

## **III. The Appointing Authority's action was not arbitrary, capricious, or contrary to rule or law**

In Colorado, arbitrary and capricious agency action is defined as:

(a) neglecting or refusing to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; (b) failing to give candid and honest consideration of evidence before it on which it is authorized to act in exercising its discretion; or (c) exercising its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions.

*Lawley v. Dep't of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001), citing *Van*

*DeVegt v. Board of County Commissioners of Larimer County*, 55 P.2d 703, 705 (Colo. 1936).

Complainant argues that Respondent should have used progressive discipline, since there is no evidence of an actual performance decline. This ALJ disagrees, for a number of reasons. First, the facts of this case do demonstrate a performance decline. Failing to report for work or to call in constitutes a failure to perform. Reporting to work intoxicated constitutes an inability to perform. These performance problems occurred within a three-week period.

Second, Board Rule R-6-2 permits disciplinary action in the absence of prior corrective action if the act "is so flagrant or serious that immediate discipline is proper." The series of acts of this case are so flagrant and serious that immediate discipline was proper. As a law enforcement agency, CSP has a right and a duty to require high standards of its employees. It has done so via General Orders. Complainant violated many of these General Orders, bringing discredit on himself and the agency.

The aggravating factors in this case are significant. First and foremost are Complainant's history of alcohol abuse and its clear relationship to his convictions for third degree assault and marijuana possession. Second is Complainant's failure to recognize his alcohol problem and take immediate steps to address it following October 31, 2001. Third is Complainant's violation of probation by continuing to drink, revealing a lax attitude towards the law enforcement community of which he was a part.

Complainant's arguments in mitigation of termination do not address these compelling aggravating factors. Complainant's Commendable performance history has no bearing on the pressing issue Trostel faced: how will Complainant's alcohol problem next affect Complainant, the agency, and the public? Complainant offered Trostel no mitigation on the alcohol issue at the R-6-10 meeting. He demonstrated no recognition of the seriousness of his alcohol problem, and no commitment to stop drinking. If he had, the complexion of this case would be significantly different. Trostel would then have had a level of trust in Complainant's behavior that he could build on. His fears about further damage to the agency's credibility and potential liability would have been alleviated, somewhat. He could have disciplined Complainant and placed him on a program to monitor his alcohol use. In the absence of a decision by Complainant to change his own behavior, however, Trostel's decision not to risk Complainant's continued employment was a reasonable one.

### **CONCLUSIONS OF LAW**

1. Complainant committed the acts for which he was disciplined.
2. Respondent's action was not arbitrary, capricious, or contrary to rule or law.

### **INITIAL DECISION**



Respondent's action is affirmed. Complainant's appeal is dismissed with prejudice.

Dated this 25<sup>th</sup> day of April, 2002.

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Mary S. McClatchey  
Administrative Law Judge  
1120 Lincoln Street, Suite 1400  
Denver, CO 80203  
303-894-1236

## **NOTICE OF APPEAL RIGHTS**

### **EACH PARTY HAS THE FOLLOWING RIGHTS**

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If the Board does not receive a written notice of appeal within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

## **PETITION FOR RECONSIDERATION**

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty-calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

## **RECORD ON APPEAL**

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is **\$50.00** (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

## **BRIEFS ON APPEAL**

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 inch by 11-inch paper only. Rule R-8-64, 4 CCR 801.

## **ORAL ARGUMENT ON APPEAL**

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

**CERTIFICATE OF SERVICE**

This is to certify that on the \_\_\_\_\_ day of April, 2002, I placed true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Mark A. Orr  
1254 South Newland Court  
Lakewood, Colorado 80232

and in the interagency mail, to:

John August Lizza  
Assistant Attorney General  
Employment Law Section  
1525 Sherman Street, 5<sup>th</sup> Floor  
Denver, Colorado 80203

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